

Memorandum

TO: Members, Clark Fork Basin Water Management Task Force
FROM: Gerald Mueller, Project Coordinator
RE:: Summary of the August 2, 2004 Meeting
DATE: August 6, 2004

Participants

The following people participated in the Task Force meeting:

Task Force Members:

Eugene Manley	Granite County
Harvey Hackett	Bitter Root Water Forum
Fred Lurie	Blackfoot Challenge
Steve Fry	Avista
Elna Darrow	Flathead Basin Commission
Phil Tourangeau	Confederated Salish and Kootenai Tribes
Gail Patton	Sanders County
Marc M. Spratt	Flathead Conservation District
Verdell Jackson	Legislature

Staff:

Gerald Mueller	Montana Consensus Council (MCC)
Mike McLane	Montana Department of Natural Resources and Conservation (DNRC)

Public:

Susan Cottingham	Montana Reserved Water Rights Compact Commission
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Meeting Goals:

- Report on the Thompson River Lumber Company Water Rights Permit Application
- Discuss the Oral and Written Public Comments on the Draft Plan
- Review and Decide on Changes to the Draft Plan Recommendations and Narrative
- Review Remaining Activities
- Public comments

Thompson River Lumber Company Water Rights Permit Application

Mike McLane reported that the DNRC has issued an interim groundwater permit for a 600 foot deep well for the Thompson River Lumber Company (TRLIC) cogeneration plant. The plant is not yet operating, apparently because of remaining air quality permit issues associated with the smoke stack.

Mr. Mueller stated that in response to direction from the Task Force at its July 12, 2004 meeting, he had called Steve Fry and asked if Avista's objection to the TRLC surface water rights permit application constituted a change in policy. Mr. Fry then reiterated his response to the question. Prior to the TRLC application, Avista had not objected to a new water right permit. Avista objected in this case because the TRLC facility is located near the Noxon Rapids Dam and no water users (except the PPL Montana Thompson Falls Dam) are located between the facility and

the Noxon Rapids project. Also, the permit attempted to restrict Avista's right to make a call on the TRLC facility in a manner which Avista believes to be inconsistent with the law. Avista's attorney advised that not objecting to the TRLC permit would be potentially damaging to Avista's legal position regarding its water rights. Mr. Fry stated that this action is not necessarily a change in Avista's policies. He also said that Avista is not opposed to cogeneration facilities because they might be viewed as a competitors in selling electricity.

Oral and Written Public Comments on the Draft Plan

Gerald Mueller passed out copies of a summary of the oral and written comments received at the Hamilton, Roman, Kalispell, Deer Lodge, and Thompson Falls public meetings and of written comments on the draft plan received by mail (see Appendix 1). The Task Force discussed the comments.

Changes to the Draft Plan

The Task Force agreed to make the following changes to the draft plan:

1. Ensure that the summary report and the Chapter 6 discussion of options to respond to the hydropower constraints on water rights the options includes all of the options covered in the public meeting Power Point presentation, i.e., add discussions of:
 - Basin closure;
 - Subordination of hydropower rights ; and
 - Storing more peak runoff in the ground.
2. In the summary report and Chapter 8, clarify that the orderly development of water requires a process for quantifying the physical availability of water, and providing for its long-term, sustainable use by the various competing existing and future users.
3. In the summary, add new sections on:
 - Plan implementation funding, including possible funding sources and their applicability to each plan recommendation;
 - The public meetings;
 - Adoption of the plan; and
 - The process by which the plan will be considered for incorporation into the state water plan.

Mr. Mueller was directed to draft these changes and circulate them to Task Force members prior to the August 16 meeting. The Task Force requested that after the plan is adopted that paper copies of the final plan be provided to each member.

Remaining Activities

DNRC Plan Presentation - Gerald Mueller reported that he did travel to Helena to meet with Jack Stults, Water Resource Division Administrator, Laurence Siroky, Water Operations Bureau Chief, and Mike McLane to discuss the draft plan. As a result of the meeting, Mr. Mueller was invited to make a more lengthy presentation of the draft plan recommendations to the DNRC Director and key DNRC water personnel tomorrow morning at 9:00 a.m. Mr. Mueller stated that he would present a Power Point summary of the plan similar to that made in the public meetings. Mr. Mueller proposed changing the discussion of providing for increased security of water rights to include the following slides:

1. To provide for increased security of water rights
 - Need to decide who has the right to use how much water, where, when, and for what purpose
 - Increase the practicality of enforcing water rights
 - Improve water rights administration

2. To decide who has the right to use how much water, where, when, and for what purpose, the state should:

- Complete the state-wide adjudication of water rights.
- Ensure that the adjudication results in durable and accurate water rights.
- Together with the CS&K Tribes, resolve as rapidly as possible the status of tribal reserved water rights through negotiation or litigation.
- Resolve the status of the hydropower rights.

The Task Force agreed to add to #2 above another bullet addressing the need to quantify the physical availability of water because we don't know how much surface water is physically available for appropriation, nor its relationship to groundwater.

Mr. Mueller encourage Task Force members to attend and participate in tomorrow's discussion with the DNRC.

Plan Adoption - Gerald Mueller stated that he would draft changes to the plan reflecting today's discussion and would email or mail the revisions to the Task Force for their review and comment. The Task Force will consider formal adoption of the basin water management plan on August 16. Revised language reflecting Task Force member comments will be provided to the Task Force as soon as possible prior to the August 16 meeting.

Signature Page - Mr. Mueller will prepare and bring to the August 16 meeting a signature page by which Task Force members can memorialize their adoption of the plan.

State Water Plan Hearings - The Task Force recommends that DNRC hold public hearings on inclusion of the plan into the State Water Plan in Deer Lodge, Missoula, Hamilton, Ronan, Kalispell, and Thompson Falls during the September - October period.

Public Comment

Susan Cottingham, Program Manager for the Reserved Water Rights Compact Commission (RWRCC) , offered comments related to the state's negotiations with the Confederated Salish and Kootenai Tribes (CSKT) and the with the USFS. Regarding the CSKT, Ms. Cottingham stated that while the negotiations have moved slowly, the RWRCC believes that progress is being made, especially on the development of an interim management plan necessary because of Montana Supreme Court decisions halting state permitting activities on the reservation. She also stated that the RWRCC's current mandate has been extended through 2009, and that the Commission is unlikely to request a further extension unless substantial progress has been made towards a compact with CSKT. Regarding the USFS negotiations, Ms. Cottingham stated that significant progress has been made, and the RWRCC expects to propose a settlement publicly this fall. The USFS appears willing to forgo instream flow reserved rights in return for reserved water rights for its administrative needs, e.g. ranger station water use, camp ground water use, etc., and for sequencing special use permits and state water right permit applications.

Sequencing means that a new water user that would require a special use permit from the USFS would obtain that permit before filing an application for a state water right permit. If the USFS decides to apply for an instream flow right, it would file a permit application with the state and the priority date for the new right would reflect the application date rather than the date associated with a reserved water right, the date on which the federal government reserved land for its own use. This agreement, if it is made, would protect existing water users and clarify the

permit requirements for new users.

Ms. Cottingham also reported on the EQC initiative to provide additional funding to complete the statewide pre-1973 water rights adjudication. She stated that individual water users would pay annually \$10 per claim filed in the adjudication up to a maximum amount of \$200 per claimant. Large volume uses such as hydropower, municipal and instream flow claimants would pay an annual fee based on a sliding scale based on volume of water used. The fees would be collected for ten years, and are designed to provide \$2.6 million per year. The purpose of the fees is to provide the Montana Water Court and the DNRC sufficient funding to complete the adjudication within 15 years.

Next Meeting

The next meeting is scheduled for Monday, August 16, 2004 at 9:00 a.m. in the DFWP conference room at 3201 Spurgin Road in Missoula. The agenda will include formal adoption of the plan and consideration of how many copies of the plan to print.

Appendix 1
Draft Clark Fork Basin Water Management Plan
Public Meeting
Comments/Questions Summary

Attendance

The number of people signing the sign in sheet is as follows:

Meeting	Number of Signers	Task Force Members
Hamilton	13	2
Ronan	9	4
Kalispell	36	4
Deer Lodge	2	2
Thompson Falls	15	4
Total	75	16

Deer Lodge

Oral Comments/Questions

- \$ DNRC and NRCS is advocating conversion of flood irrigation to sprinklers.
Depending on soil types, conversions may adversely affect return flows and stream flows and may also result in higher irrigation costs.
- \$ It makes sense to try to speed up the water rights adjudication.
- \$ Water education is needed for existing water users, not just new Montana residents.
- \$ The state should be more active in enforcing water rights.
- \$ Enforcement should be kept simple and affordable.

Hamilton

Oral Comments/Questions

- \$ How will we pay for the plan initiatives?
- \$ More education is needed of both existing residents and people moving here.
- \$ Money for plan initiatives won't become available until something big happens.
- \$ Don't worry about funding - "go for it." Put pressure on the legislature and DNRC Director.
- \$ Plan recommendations appear to make common sense.
- \$ There should be some way for people to file affidavits in support of their water rights claim filings.
- \$ Avista's water right appears too big.
- \$ Avista's water right should be based on what they can use.
- \$ Consider forming groundwater conservancy districts.
- \$ The plan needs more emphasis on water conservation; could be provided through education.
- \$ Reduce urban "slobber", i.e. waste of water.
- \$ Should be planning for a water supply for 100 years.
- \$ Need to maintain transportation & energy corridor.
- \$ Need cross pollination of sprawl/growth and water availability.

Written Comment

- \$ Good job on an incredibly complicated important set of issues!
- \$ Priority set of draft sections: 7-5, 7-6, 8-2&3, 9-1, and 9-2.
- \$ Water is (will be) the issue of the 21st century!!

Kalispell

Oral Comments/Questions

- \$ DNRC is already planning to tax water.
- \$ Avista's water concerns are a catalyst to tax water.
- \$ Just take the water from Avista.
- \$ Did the state own the water prior to 1973 (i.e. passage of the Montana Water Use Act)?
- \$ Water rights are in jeopardy when the legislature is in session.
- \$ Recommendation 8-3 will provide work for water professionals.
- \$ PPL Montana is already storing water in the ground to the detriment of agriculture.
- \$ No consider or distinction is currently given between agriculture, domestic, and industrial uses.
- \$ Montana is a headwaters state, so we should have first call on water. Other states want Montana's water.
- \$ Why don't we know the capacity of the Flathead aquifer?
- \$ How will we deal with a federal judiciary that fails to recognize state rights?
- \$ Has the Task Force worked out anything with the Tribes?
- \$ We are being sold down the river and we need to get active.
- \$ If government can subordinate Avista's water rights, then it can subordinate my agricultural water rights.
- \$ If you go after Avista for overuse of water, then you can also go after agriculture for overuse.
- \$ What is a water right?
- \$ Can the state take away a water right?
- \$ The problem with Avista would have been alleviated, if the state had bought the dams.
- \$ Hungry Horse water is already being take for salmon recovery.
- \$ What was the connection to groundwater?
- \$ Does Montana already have a specialized water court?
- \$ Has the Montana Supreme Court had an impact on new water appropriations?
- \$ Can you prioritize areas in the adjudication?
- \$ Is a hydropower water right covering its peak use, or just average use?

Written Questions and Comments

- \$ How can you do an accumulative impact unless you first know the amount available?
- \$ How are you going to measure the amount available in the ground?
- \$ How are you going to measure any connection between surface and groundwater?
- \$ If you store water in the ground how are you going to keep from creating unbuildable property or change existing structures because of high groundwater?
- \$ The private use of water is not a right and is a permit of use, are you saying that the owner of the water (the state) has the legal right to withdraw that "permit"? Would it not be more secure for the owner to have a "legal" binding lease or do we have a legal binding "right-of-use" now?

- \$ 7-5 & 8-3 - What is connection? Before you have a commissioner, you need water rights examiners. (Usually a surveyor, licensed to examine rights) to locate on the ground.
- \$ Recommendation 7-5, item 4 - Sharing the cost of water commissioners be rights holders, not just those receiving the water, seems like being charged for electricity even if you don't use it. It appears this may cause some people to sell rights to avoid expenses. Please explain.

Ronan

Oral Comments/Questions

- \$ Need to understand the effects of Hungry Horse water contracts on fill and bank restoration.
- \$ Does the concern about USFS management and water flows translate to clear cuts.
- \$ USFS management is constrained by laws such as the Endangered Species Act so that it cannot manage only to increase flows.
- \$ Plan needs to explain better what is meant by USFS management to optimize flows
- \$ Learn a lesson from the Tribes, manage water to provide instream flows.
- \$ Counties are not using their authorities to regulate subdivision activity.
- \$ Plan should encourage Avista to use its water rights to affect growth issues, e.g. prevent large scale water extractions not in the public interest such as the Rock Creek Mine.
- \$ Supports recommendations about requiring a cumulative effects analysis and eliminating the 35 gpm exemption.
- \$ In favor of moving forward with the Compact negotiations and the adjudication.
- \$ The Lolo, Bitterroot, and Flathead National Forest Plans are under review, so this is an opportune time to consider USFS management and water flows.

Thompson Falls

Oral Comments/Questions

- \$ Why is the adjudication taking so long?
- \$ Is there a precedent for the state looking into hydropower water rights?
- \$ What happens to the Milltown Dam water rights when the dam is removed?
- \$ Are instream and consumptive water rights accounted for separately in state water rights?
- \$ Won't storing water in the ground risk contaminating groundwater?
- \$ How do you get water into the ground to be stored?
- \$ Has BOR indicated the price of water in a contract for Hungry Horse water?
- \$ Are there computer models that would help answer questions about the use of Hungry Horse water?
- \$ How do you predict the effects of new wells on both ground and surface water?
- \$ How can we view maps of aquifers?
- \$ Will funding and technical assistance be available to cities and counties to implement the plan recommendations?
- \$ How do cities and counties get information about where water is available?
- \$ How would the DNRC assess cumulative effects of groundwater development?
- \$ Does the state now decide when development is using all available groundwater?
- \$ Is Avista using water to produce all power possible?
- \$ Can Avista use more water?

- \$ Is Avista power sold out of state?
- \$ The Tribes and Avista appear to have the controlling water rights in the basin. Has the Task Force assessed the implications of using Hungry Horse water for the Tribes and Avista?
- \$ What happens to our groundwater supply if the drought continues over the long term?
- \$ Is DNRC cooperating with DEQ and EPA over Superfund and water quality issues?
- \$ How much would implementing the plan recommendations cost, and from where would the money come?
- \$ Do we have an obligation to supply a specific amount of water to downstream states?
- \$ Is education a part of the conservation recommendations?
- \$ Incentives should be used to induce individual conservation actions.

Written Comments Received Via Mail or Fax

...(H)ydroelectric power rights (should be allowed) to stand, since most hydroelectric water is returned to system for fisheries and irrigation, but do not allow Avista Corporation to change their hydropower rights to other uses, such as selling their rights for irrigation or commercial water to out-of-state companies. Montana should work on a plan to store more peak runoff in the ground. Montana should continue to give preference to senior water rights users. Water rights that have been in the process of adjudication for 20+ years should be settled quickly, but new water rights requests should be thoroughly reviewed to make sure they are not being over allocated at the expense of existing senior water rights.

First, your inventory of hydro electric facilities existing in CF drainage was not complete: The Bigfork Dam on the Swan River and the north end of Flathead Lake certainly has a power generation right since it penstocks about half the river for about two miles. There is also a pump storage dam on the south end of Flathead Lake at Hellroaring Creek which no doubt has a generation right. Also, the power value of water used to generate at Kerr Dam is the property of the S&K Tribes and they share the generation license.

Would also like you to consider the following in your draft report:

--- That preserving wetlands as means of capturing CF drainage water is great but you are going to have to bring in such consumers of wetlands as the Montana Department of Transportation to give the measure any teeth. Since highways generally follow river valleys, MDOT projects have a large attrition on wetlands.

--- The idea of retooling forest management to maximize water production is good but you must also take into account uses of the federal and state forests such as endangered species management, silva culture and recreation which also have social value but may conflict with water management. This principal of balancing water against other social needs should be applied to any policy designed to maximize water production.

--- There may be a silver lining in the Avista right to the CF flow leaving the state. If Avista can contest the water right permit to Thompson Falls Co-generation, it could also object to other major water consuming projects such as the Rock Creek Mine at Noxon or the Seven Up Pete Mine at Ovando. In fact, that permit could be the key to realistic growth management throughout western Montana.

(A)llow hydroelectric power rights to stand, since most hydroelectric water is returned to system for fisheries and irrigation, but do not allow Avista Corporation to change their

hydropower rights to other uses, such as selling their rights for irrigation or commercial water to out-of-state companies. Montana should work on a plan to store more peak runoff in the ground. Montana should continue to give preference to senior water rights users. Water rights that have been in the process of adjudication for 20+ years should be settled quickly, but new water rights requests should be thoroughly reviewed to make sure they are not being over allocated at the expense of existing senior water rights.